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IN THE

Supreme Court of the United States

October Term, 1965
No. .....

A. J. BUMB, as Trustee in Bankruptcy of United States Chemical Milling Corporation,

Petitioner,

vs.

THE HARTWELL CORPORATION,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

I.

Preliminary Statement.

The Hartwell Corporation, respondent in the Petition of A. J. Bumb, as Trustee in Bankruptcy for the United States Chemical Milling Corporation, for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, by this Brief replies to the Petition.

We agree that the Court of Appeals for the Ninth Circuit rendered the Opinion which is attached to the Petition as Appendix A, and that jurisdiction to consider the Petition is grounded as set forth in the Petition.

II.

Questions Presented.

Petitioner's presentation of the questions presented is argumentatively slanted in favor of petitioner's position and does not, we feel, contain an accurate statement of the questions presented.

Moreover, petitioner fails entirely to pose its list of "Questions Presented" by reference to, and in light of, Rule 19(1)(b), which sets forth the types of situations under which the Supreme Court will grant Certiorari.

A more accurate, we submit, statement of the single question here presented is as follows:

> "Should the Supreme Court of the United States grant a Petition for Certiorari to review a Decision of the Court of Appeals in a case which arose in a Bankruptcy proceeding, wherein the Trustee, in his official capacity, as Seller, made a material misrepresentation of fact to the Buyer, on which the Buyer relied in purchasing the property, and wherein the Referee in Bankruptcy awarded damages measured by loss of profit which would have been realized had the representation been true, which expected profit was one of the elements for which consideration was paid by the Buyer?"

III.

Statement of the Case.

Petitioner's statement of the case is also argumentatively slanted in favor of petitioner's position in several respects. We submit that the following brief statement is an accurate one:

Petitioner, in his official capacity as a Trustee in Bankruptcy, after having obtained Court permission authorizing him to do so, sought to sell, at private sale, a going business consisting of physical assets and goodwill known as the "Missile-Air Latch Division". The Trustee solicited offers from various parties, including respondent, The Hartwell Corporation, and, in so soliciting, represented that the "backlog of orders as to the Division amounted to $60,872.00." Respondent submitted an offer consisting of cash, assumption of royalty and other obligations, and a new obligation to pay royalty to the Trustee over a ten-year period. The Trustee accepted the offer, the transaction was placed in Escrow, and the physical transfer of the personal property was made to the respondent-buyer. In submitting the offer, in entering into the Escrow, and in taking possession of the physical property, respondent relied on the representation as to the backlog; and the backlog was part of that for which the respondent paid. At this point, it was discovered that the amount of the backlog had been misrepresented, but, without waiving its claim for damages, respondent completed the transaction, rendered the consideration to the Trustee-seller, and

sought relief before the Referee in Bankruptcy for its damages. After trial, the Referee made Findings of Fact, adopted Conclusions of Law, and rendered Judgment in favor of the respondent-buyer, awarding $14,579.06 to the respondent-buyer, payable out of the bankrupt estate (actually payable by offsetting the same against royalty in favor of the bankrupt estate then in the process of accruing).

The Trustee in Bankruptcy petitioned the District Court for review, and, in a four-line Order, the District Court purported to order the judgment of the Referee reversed.

On Appeal from this Order, the Court of Appeals for the Ninth Circuit reversed the Order of the District Court, and ordered the reinstatement of the Judgment of the Referee in Bankruptcy.

IV.

Reasons for Denial of the Writ.

As noted above, the petitioner has failed to identify clearly the justification for granting a Writ of Certiorari within the ground rules prescribed by Rule 19(1)(b), and the applicable case law. However, a process of elimination suggests the only possible applicable provision of this Rule which might conceivably justify the granting of this Writ.

It is not contended that the decision of the Court of Appeals is in conflict with the decision of any Court of Appeals on the same matter, justifying the granting of the Writ in the interests of achieving uniformity; it is not contended that the Court of Appeals has decided an important question of Federal law which has not been, but which should be, settled by the

Supreme Court; it is not suggested that the Court of Appeals has decided the Federal question in a way which is in conflict with an applicable decision of the Supreme Court of the United States, or has misconceived the maintaining of a "controlling" Supreme Court decision; nor is it suggested that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a local court, as to call for an application of the Supreme Court's power of supervision.

Obviously, the petitioner is contending that the Court of Appeals has decided "an important State question" in such a way as to conflict with applicable State law.

At the threshold, it must be determined whether or not there is involved here "an important State question". Unless it is, in fact, an important State question, no one can expect the Supreme Court of the United States to concern itself with the question.

The Findings of Fact of the Referee, as disclosed by only a cursory review of the record, foreclosed a review in the Court of Appeals, and forecloses a review by the Supreme Court, since they are plainly supported by competent evidence within the Federal Rule that they must be accepted unless "clearly erroneous". This also forecloses the contentions asserted by the petitioner here, and also asserted in the Court of Appeals, that a Trustee is not liable in a deceit action for a statement made by him in reliance upon information obtained from responsible employees of the debtor, the accuracy of which information he believed, and had no reason to doubt, and that damages may not be recovered on

the theory of misrepresentation when the true facts are discovered sufficiently prior to the consummation of the transaction to permit the complaining party to withdraw.

Petitioner, while advancing these arguments, is patently refusing to recognize that he is quarreling with factual determinations of the finding of fact which were made against him on competent evidence, and the obvious application of the doctrine of *respondeat superior,* and the doctrine that waiver is a question of fact and will never be found where a rescission could not restore the parties to *status quo.* In brief, while these points are urged, they actually involve factual determinations made against the petitioner, and no question of State law, important or otherwise, is involved.

Thus, the only possible question of State law involved is as to the measure of damages. We do not agree, as we shall point out in more detail *infra,* that the decision of the Court of Appeals was in any way in conflict with State law. But, even assuming, for the limited purpose of this discussion, that there is, or might have been, some conflict, it is manifest that it is not an important question of State law.

"Important" suggests that the question must be more than academic, and more than intellectually interesting; that it is special; that it is of serious concern to a substantial segment of the public, as distinguished from litigants themselves in the context of their peculiar factual situation, and a few others who might find themselves involved in similar factual situations. Tested by these rules, the question of measure of damages, in the limited factual situation involved in this case, is manifestly not special and not important.

But, even assuming that there is here involved a "special and important question of State law, the next inquiry is whether or not the Court of Appeals has decided it in such a way that it is in conflict with applicable State law. We submit that, as we shall demonstrate in the next section of this Brief, the Court of Appeals did not decide a State law question in conflict with applicable State law, and that the Petition should, therefore, be denied.

V.

The Decision of the Court of Appeals Is Not in Conflict With Applicable State Law.

Respondent accurately quotes *California Civil Code* §3343, which reads as follows:

> "[*Damages for fraud in the purchase, sale or exchange of property.*] One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction.
>
> "Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled."

The Court of Appeals clearly did not ignore this statute. It said:

> "We agree that in some instances the 'out-of-pocket' approach is a correct measure of damages and has been properly used in a number of cases. It is the general rule adopted by §3343 of the Cali-

fornia Civil Code. But we cannot blindly adhere to this approach as the exclusive measure of damages. In the present case, the referee relied upon what is commonly referred to as the 'benefit of the bargain rule,' comparing the value of what was represented would be received to the value of what actually was received. The district court apparently did not object to this approach. Many courts have recognized this approach as a reasonable method of damage calculation. Under the circumstances presented in this case, we think it is reasonable to conclude that the 'benefit of the bargain' approach would be the more accurate method of damage measurement for it would not entail a valuation of each element of the contractual consideration. The method used by the referee merely had to compare two readily ascertainable figures, *viz.,* the actual backlog as of August 31, 1962, and the represented backlog as of that date. The method used is an accurate measurement of the damages sustained, and nothing in the district court order, the record of the bankruptcy proceedings, or the appellee's brief leads us to a contrary conclusion."

The petitioner apparently would have this Court believe that the general rule enunciated in Section 3343 of the California Civil Code is so inflexible that *any* Judgment which departs from a comparison of the actual value of that which the defrauded person parted with and the actual value of that which he received, in the *context of the entire contract,* is erroneous. Such is clearly not the case under California law; the statute itself does not so state, and the California courts have concededly departed from such an inflexible rule where

the circumstances of a particular case called for such departure. (See e.g., *Ward v. Taggart* (1959), 51 Cal. 2d 736, 741-742; *Coleman v. Ladd Ford Co.* (1963), 215 Cal. App. 2d 90, 93-94. See also: 11 University of California at Los Angeles Law Review (1964), pp. 876-884.)

Actually, that which the Court of Appeals said briefly may be paraphrased and expanded to reflect this: The buyer bought a business consisting of a number of component parts, namely, machinery, inventory of parts, drawings, specifications, backlog of orders, and good will. There being no evidence to the contrary, it must be assumed that the buyer paid a fair market value for what it bought, and what it was represented by the seller that it was buying, including a backlog of orders in a certain amount. When the backlog turned out to be substantially less than it had been represented to have been, and when, through arithmetical computation, based upon competent and undisputed evidence, it was possible to measure the dollar and cents value of the backlog as it actually existed, as compared with that which was represented, then it follows that the buyer has been damaged in a measurable amount of money, that, actually, the buyer must be deemed to have paid for the segment of the property, consisting of backlog, the amount which the backlog would have been so measurably worth had it been in existence, and that which the buyer paid for that backlog was in excess of that value by the measurable amount of the non-existent portion of the backlog. That which petitioner seeks to read into the decision of the Court of Appeals is that the Court of Appeals, by the language which it used, affirmatively held

that the buyer, viewing the contract as a whole, got greater value for the total consideration with which it parted. The Court of Appeals' decision contains no such holding; respondent, before the Referee, obtained no such Finding of Fact, and certainly none is made or suggested by the brief Order of the District Court. The most that can be said is that respondent, before the Referee, presented evidence, and made argument thereon, which the Referee did not accept. In any event, that the Court of Appeals did not consider its decision to be grounded upon any such holding is demonstrated by the paragraph immediately preceding the one quoted above. The Court of Appeals says:

> ". . . Appellee, in his brief, argues at great length that the damage calculation was incorrect, and that appellant in fact sustained no injuries from the misrepresentation. Appellee urges that the only proper method of calculation is the so-called 'out-of-pocket' approach, which compares the value of the detriment suffered by each party to the entire contract. Appellee contends that the value of that received by appellant, even using the actual backlog figure, exceeded the value of that given by appellant. Appellee reaches this conclusion by attempting to evaluate each element of consideration involved in the transaction."

When viewed in the light of the Findings of Fact of the Referee, and in the light of the trial record, it is manifest that neither the Referee, the District Court, nor the Court of Appeals considered the argument of the petitioner that respondent received greater value under the entire Contract to have merit; on the contrary, the record contains substantial evidence that,

viewing the Contract as a whole, respondent received property the value of which was less than the consideration which it paid, to the extent of the missing backlog.

It seems clear that the Court of Appeals' reference to the "out-of-pocket" rule should be considered as saying that, even if the facts might justify its application, it could and should be departed from under peculiar facts providing a more readily ascertainable and more equitable means of determining the dollar amount of damages. Such a departure is clearly sanctioned under California law. (*Ward v. Taggart, supra,* 51 Cal. 2d 736, 741-742; *Coleman v. Ladd Ford Co., supra,* 215 Cal. App. 2d 90, 93-94; 11 University of California at Los Angeles Law Review (1964), pp. 876-884.)

It is respectfully submitted that the decision of the Court of Appeals is not ". . . in conflict with applicable state . . . law . . .", and, therefore, that this Court should deny the within Petition.

Respectfully submitted,

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